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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 GARY CHARLTON and TRINA
10 CHARLTON,
11 Plaintiffs,
12 v.
13 WELLS FARGO BANK, N.A.,
14 Defendant.
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No. 2:14-cv-00349-SAB

**PRELIMINARY INJUNCTION
ORDER**

16 Before the Court is Plaintiffs' Motion for Temporary Restraining Order,
17 ECF No. 5. A hearing on the motion was held on January 21, 2015. Plaintiff Gary
18 Charlton participated *pro se* and Defendant was represented by Arthur A.
19 Simpson. This order memorializes the Court's oral ruling.

20 On October 9, 2014, Plaintiffs Gary Charlton and Trina Charlton filed a
21 complaint in Spokane County Superior Court, alleging violations of the
22 Washington State Consumer Protection Act, Wrongful Foreclosure, Fraud,
23 Misrepresentation and Deceit and Unfair Business Practices. An Amended
24 Complaint was filed on October 22, 2014. Count 1 alleges violation of the
25 Washington Consumer Protection Act; Count 2 alleges violation of the Consumer
26 Financial Protection Act of 2010, 12 U.S.C. § 5481 *et seq.*, with respect to loan
27 servicing; Count 3 alleges violation of the Consumer Financial Protection Act of
28 2010, 12 U.S.C. § 5481 *et seq.*, with respect to foreclosure processing; Count 4

1 alleges dual tracking; Count 5 alleges negligence; and Count 6 asks for injunctive
2 relief for violation of the Consumer Protection Act. ECF No. 3-2 at 72-81.

3 **A. Background Facts**

4 The following facts are taken from Plaintiffs' Amended Complaint and
5 subsequent briefing. In 1998, Plaintiffs built a home in Nine Mile Falls,
6 Washington. In February, 2005, Plaintiff refinanced the mortgage with Wells
7 Fargo. Plaintiffs were required to make payments in the amount of \$2,182.41.
8 Wells Fargo sold the loan to Freddie Mac and became the loan service provider for
9 Freddie Mac.

10 Plaintiffs made timely payments between March 1, 2005 and March 1, 2012.
11 In August, 2011, Plaintiffs contacted Wells Fargo and asked about a loan
12 modification due to unemployment issues. Plaintiffs were referred to Wells Fargo
13 Home Affordable Refinance Program (HARP). Plaintiffs contacted the Wells
14 Fargo HARP department and were told that a HARP package would be sent to
15 them. According to Plaintiffs, the HARP package was not received. Between
16 November, 2011 until October, 2014 when Plaintiffs filed the instant action,
17 Plaintiffs continually attempted to contact Wells Fargo to obtain a loan
18 modification. According to Plaintiffs, Wells Fargo failed to respond or return their
19 phone calls, or make a decision on their pending applications.

20 On December 30, 2013, Plaintiffs received a call from Jose Gonzales, a
21 Wells Fargo foreclosure specialist. He indicated that a temporary loan
22 modification was approved and was sent to Plaintiffs in November, 2013. He
23 instructed that Plaintiffs needed to sign it and submit a payment of \$1166.04
24 before the end of the day to keep the approved temporary loan modification from
25 expiring. Plaintiffs indicated to Mr. Gonzales that no paperwork was received. Mr.
26 Gonzales directed them to Wells Fargo website and instructed them to fill out a
27 generic online application, email it to him, and submit a payment of \$1166.04.
28 Plaintiffs completed the online application, and attempted to make the payment of

1 \$1166.04 at a Wells Fargo branch. Employees at the branch were unable to accept
2 the payment because Plaintiffs' account was locked. The manager of the branch
3 unsuccessfully tried on multiple times to contact Mr. Gonzalez as well as the
4 Wells Fargo modification department to try to resolve the issue of accepting
5 Plaintiffs' payment, but the calls went directly to voice mail.

6 The next day, Plaintiffs spoke with Mr. Gonzales. He explained that because
7 no timely payment was made, the foreclosure was to proceed, and there was
8 nothing he could do at the point. Currently, the foreclosure sale is scheduled for
9 January 23, 2015.

10 **B. Motion Standard**

11 Pursuant to Fed. R. Civ. P. 65, a court may issue a temporary restraining
12 order upon a showing "that immediate and irreparable injury, loss, or damage will
13 result to the movant before the adverse party can be heard in opposition." Fed. R.
14 Civ. P. 65(b)(1)(A). The purpose of such an order is solely to preserve the status
15 quo and to prevent irreparable harm "just so long as is necessary to hold a hearing,
16 and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423,
17 439 (1974).

18 Here, although Plaintiffs are seeking a temporary restraining order,
19 Defendant received notice of the motion, and thus, the issue is whether the Court
20 should grant a preliminary injunction. Fed. R. Civ. P. 65(a)(1). The standard for
21 issuing a temporary restraining order is identical to the standard for issuing a
22 preliminary injunction. *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co,*
23 *Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking a preliminary
24 injunction must establish: (1) a likelihood of success on the merits; (2) a
25 likelihood that plaintiff will suffer irreparable harm in the absence of preliminary
26 relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is
27 in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20
28 (2008).

1 The Ninth Circuit employs a “sliding scale” approach to *Winter*’s four-
2 element test. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
3 Cir. 2011). Under this approach, the elements of the preliminary injunction test are
4 balanced, so that a stronger showing of one element may offset a weaker showing
5 of another. *Id.* at 1131. Identified as the “serious questions” test, the Circuit has
6 held that a preliminary injunction may issue if the plaintiff raises “serious
7 questions going to the merits” and demonstrates that “the balance of hardship tips
8 sharply towards the plaintiff’s favor,” but only so long as the plaintiff also
9 demonstrates that irreparable harm is likely—not just possible—and that the
10 injunction is in the public interest. *Id.* (internal quotation marks omitted). Finally,
11 “a preliminary injunction is an extraordinary remedy never awarded as of right.”
12 *Winter*, 555 U.S. at 24. Thus, a district court should enter preliminary injunctive
13 relief only “upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at
14 22.

15 **C. Plaintiff’s Claims**

16 In their Complaint, Plaintiffs assert a number of claims, including a claim
17 for dual tracking and violations of the Consumer Protection Act.

18 The Consumer Protection Act prohibits “unfair methods of competition and
19 unfair or deceptive acts or practices in the conduct of any trade or commerce.”
20 Wash. Rev. Code § 19.86.020. To prevail in a private CPA claim, the plaintiff
21 must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or
22 commerce, (3) affecting the public interest, (4) injury to a person’s business or
23 property, and (5) causation. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash. 2d 27,
24 37 (2009). The first element may be predicated upon (1) a per se violation of a
25 statute; (2) an act or practice that has the capacity to deceive substantial portions
26 of the public; or (3) an unfair or deceptive act or practice not regulated by statute
27 but in violation of public interest. *Klem v. Wash. Mut. Bank*, 176 Wash.2d 771
28 (2013).

1 In 2011, the Washington legislature passed the Foreclosure Fairness Act
2 (FFA). The purpose of the Act, in part, was to create a framework for homeowners
3 and beneficiaries to communicate with each other to reach a resolution and avoid
4 foreclosure whenever possible; and provide a process for foreclosure mediation
5 when a housing counselor or attorney determines that mediation is appropriate.
6 2011 Wash. Leg. Serv. Ch. 58, § 1. The Act amends the Deed of Trust Act, and
7 establishes a mediation program that requires lenders to mediate in good faith. It
8 also changed the requirements for pre-foreclosure notice, Wash. Rev. Code §
9 61.24.030, .031, .040, and allowed for recovery of damages for violations of the
10 CPA, § 61.24.135. Specifically, the FFA states:

11 It is an unfair or deceptive act in trade or commerce and an unfair
12 method of competition in violation of the consumer protection act,
13 chapter 19.86 RCW, for any person or entity to: (a) violate the duty of
14 good faith under RCW 61.24.163; (b) fail to comply with the
15 requirements of RCW 61.24.174; or (c) fail to initiate contact with a
16 borrower and exercise due diligence as required under RCW
17 61.24.031.
18 § 61.24.135.

19 Plaintiffs' allegations contained in the complaint, if true, would
20 arguably support a claim under the Consumer Protection Act and the
21 Foreclosure Fairness Act. For example, Plaintiffs' allegations include
22 numerous instances where Defendant indicated to them that it had sent
23 documents to Plaintiffs, but Plaintiffs never received the documents.
24 Defendant then would rely on the lack of response to continue with the
25 foreclosure proceedings. Notably, in this case, Defendant filed a Notice of a
26 December 18, 2014 letter that was purportedly sent to Plaintiffs. ECF No.
27 12. Plaintiffs filed a response stating they had not received the letter. ECF
28 No. 16. At the hearing, Defendant's counsel clarified that the letter was
never sent, and indeed, Plaintiffs were correct when they stated they never
received the letter.

1 **D. Analysis**

2 Here, the Court exercises its equitable powers pursuant to Fed. R. Civ. 65,
3 to grant Plaintiffs' motion. The Court finds that Plaintiffs will suffer irreparable
4 harm if they lose their home and are forced to relocate. A foreclosure sale will
5 leave Plaintiffs without the home that they have built and shared for over a decade.
6 There is no doubt that foreclosing on the deed of trust would cause emotional and
7 financial strain to Plaintiffs. Additionally, the balance of equities tip in Plaintiffs'
8 favor and an injunction is in the public interest. Because Plaintiffs raise "serious
9 questions" whether the FFA and the CPA have been violated, it is appropriate to
10 enjoin the scheduled trustee sale.

11 Although Plaintiffs have filed two previous lawsuits, one filed in federal
12 court and one filed in state court, it does not appear that either case included CPA
13 or FFA claims. Consequently, collateral estoppel or *res judicata* does not apply.

14 **E. Payment to Clerk of Court**

15 The Court will require Plaintiffs to pay to the Clerk of Court the sum of
16 \$1166.04 every 30 days, which, according to Plaintiffs, is the amount that was due
17 under the proposed loan modification presented in November, 2013.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. Plaintiffs' Motion for Temporary Restraining Order, ECF No. 5, is
20 **GRANTED**. The trustee sale scheduled for January 23, 2015 is enjoined until
21 further notice from the Court.

22 2. Plaintiffs' Motion for Entry of Default, ECF No. 11, is **DENIED**.

23 3. Plaintiffs' Motion to Strike, ECF No. 19, is **DENIED**.

24 4. Plaintiffs' Motion for Default Judgment, ECF No. 20, is **DENIED**.

25 5. **Within 2 weeks** from the date of this Order, Plaintiffs shall deposit
26 \$1166.04 with the Clerk of the Court, and shall **continue** to pay this amount to the
27 Clerk of Court **every 30 days** after the first deposit.

28 6. On or before **February 5, 2015**, Defendant shall file its Answer.

1 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
2 file this Order and provide copies to counsel.

3 **DATED** this 22nd day of January, 2015.



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9 Stanley A. Bastian
10 United States District Judge
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